



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-96-21-T
Date: 12 June 1998
Original: English

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 12 June 1998

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO also known as "ZENGA"

**DECISION ON THE MOTION OF THE JOINT REQUEST OF THE ACCUSED PERSONS
REGARDING THE PRESENTATION OF EVIDENCE, DATED 24 MAY 1998**

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry
Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Ekrem Galijatović, Mr. Eugene O'Sullivan, for Zejnil Delalić
Mr. Željko Olujić, Mr. Tomislav Kuzmanović, for Zdravko Mucić
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landžo

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 24 April 1998, this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991 ("International Tribunal") issued a scheduling order pursuant to the provisions of Article 20 paragraph 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute") and Rule 54 of the Rules of Procedure and Evidence ("Rules"). This Trial Chamber is here considering a motion of the Joint Request by the Defendants Delalić, Mucić, Delić and Landžo Regarding Presentation of Evidence filed on 25 May 1998 ("Motion") (Official Record at Registry Page ("RP") D6192 - D6199).

The Office of the Prosecutor ("Prosecution") did not file a response to the Motion.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the Defence,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Summary of the Motion.

2. The defendants rely on the provisions of Article 21(4)(e) of the Statute of the Tribunal. The motion seeks to restrain the Trial Chamber from "unduly restricting which witnesses the Defendants will be allowed to call and unreasonably limiting the number of witnesses the Defendants will be allowed to present on a given issue of fact as was indicated by the Trial Chamber during the Status Conference of 21 May 1998".

3. More specifically, the Defence claims that the actions of the Trial Chamber has the effect of denying the accused persons their right to assistance by counsel, in that they are prevented from presenting evidence under the same conditions as the Prosecution presented evidence against them. Accordingly, they are (a) deprived of the right to challenge evidence previously presented against them by the Prosecution and found by the Trial Chamber to be relevant; (b) the Trial Chamber is determining the credibility of Defence witnesses without hearing those witnesses; (c) the Trial Chamber's rulings with regard to unnecessary repetition and relevance as applied to Prosecution witnesses has been considerably different from the standards applied to Defence witnesses.

4. The provisions of Articles 20, 21(1),(2),(4)(e) of the Statute and Rules 89(1),(2),(3),(4) and 95 of the Rules (as amended) are specifically cited and relied upon. The Defence also cited and relied upon the Trial Chamber's oral Ruling of 30 March 1998 (Draft Transcript Pages 10104-10105) on Prosecutor's Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-examination by the Prosecution and Counsel for the Co-accused, filed on 18 March 1998 (RP D5929 - D5935).

5. The motion referred to the Scheduling Order of 24 April 1998 which directed the Defendants *inter alia* to file confidentially with the Registry for service on the other Defendants and the Trial Chamber a complete list of the witnesses they intend to call stating the order in which they are to appear, a summary of the evidence related to the counts which each witness is to testify, and the expected duration of the examination in chief. All the Defendants have complied with the Scheduling Order.

6. At the Status Conference of 21 May 1998, the Trial Chamber announced its intention of establishing witness lists for the Defendants.

B. Arguments in Support of the Motion

7. Mr. Greaves arguing the motion on behalf of the Defendants adopted as the basis of his argument the nature and basis for the request as in the motion, and set out in paragraphs 2 and 3 above.

8. The Defendants recognise the necessity for a fair and expeditious trial as guaranteed by Articles 20 and 21 of the Statute of the Tribunal. They also appreciate the responsibility of the Trial Chamber to give effect to the rights of the Defendants as elucidated by the Trial Chamber at the Status Conferences of Friday, 17 April 1998 and Thursday, 21 May 1998.

9. At the Status Conference of 21 May 1998, counsels for the Defendants stated clearly that whenever possible there will be no duplication of evidence. When a potential witness appears on the list of more than one Defendant, in order to avoid duplication of testimony, his or her evidence will be elucidated either through direct examination or cross-examination. The witness lists filed by the Defendants pursuant to the order of the Trial Chamber is designed to give an overview of the Defendants' witnesses.

10. The Defence submits that the Trial Chamber is not entitled to determine which witnesses should be called by each Defendant, or the order in which witnesses are to be called. Only counsel to the Defendants can determine the witnesses for their respective clients, and the order in which they will testify.

11. Mr. Greaves moving the Motion, elaborated on the submissions of the Defendants. He relied on Articles 20 and 21 of the Statute, relied upon by the Defendants as the fair trial provisions found in a number of similar statutes throughout the 'civilised world'. Counsel referred to the *Tadic* case where the Judges noted that the provisions of Articles 20 and 21 are an adaptation of Article 14 of the ICCPR. He submitted that the words used are almost verbatim. They are contained in the European Convention on Human Rights, and as Bills of Rights of national laws. Similar guarantees also appear in Article 75 of Protocol 1 of the Geneva Conventions.

12. Counsel lay emphasis on paragraph 1 of Article 20 of the Statute, and the use of the words "shall ensure" that a trial is fair and expeditious, that proceedings are conducted in accordance with the Rules of Procedure and Evidence with full respect for the rights of the accused. It was submitted that the rights referred to are those headed "Rights of the Accused". The important rights are: (a) Article 21(1) on the equality of all persons before the International Tribunal; (b) Article 21(2) entitles the accused to a fair and public hearing subject to Article 22 in the determination of the charges against him; (c) Article 21(4) prescribes the minimum guarantees to which the accused shall be entitled in full equality in the determination of any charge against him.

13. One of these guarantees is that contained in sub-paragraph (e) which is "to examine or have examined the witness against him and to obtain the attendance and examination of witnesses on his behalf under *the same conditions as those against him.*" Counsel stressed the words italicised as being mandatory, and not at the discretion of the Trial Chamber. It was submitted that these are what might properly be referred to as the equality of arms provision.

14. In support of the equality of arms provision, counsel cited the dictum of Judge Vohrah in the Decision on the Prosecution Motion for Production of Defence Witness Statements, in *Prosecutor v Dusko Tadic* (Case No. IT-94-1-T, decision of 27 November 1996, Separate Opinion of Judge Vohrah, RP D15324 - D15330) where he said:

The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side. [...] Thus the European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution. [...] It seems to me from the above authorities that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused.

The above dictum was submitted as "a concise but accurate exposition of what all of us understand by the principle of equality of arms".

15. Adopting the analogy of a level playing field, counsel submitted that the Prosecution and Defence must operate according to the same regime. It is neither proper nor indeed lawful to apply different regimes to the Prosecution and the Defence in the presentation of evidence. Counsel argued that the Prosecution in this case was able to call such witnesses as they chose, with the exception of the evidence relating to a handwriting expert which was refused on specific grounds.

16. Counsel referred to circumstances in which the Trial Chamber had the right to exclude evidence it considered irrelevant as set out in rule 89(D). Rule 95 enables evidence to be excluded, if the method of obtaining such evidence casts "substantial doubts on its reliability or if the admission of the evidence is antithetical to and would seriously damage the integrity of the proceedings".

17. Counsel submitted that the Trial Chamber had earlier held, and properly too, that it is not for the Trial Chamber to organise and determine the case for the Defence. It is also not its duty to determine the order in which witnesses are called. Although counsel conceded that if a witness gives irrelevant evidence or evidence without probative value, the Trial Chamber is entitled to exclude it. He however submitted that there is no power under the Statute or the Rules of the Tribunal to determine which witness the Defence will call. Furthermore that the effect of a breach of this rule is to put the Trial Chamber effectively in the place of Defence counsel, whose duty it is to organise the defence of the accused and to determine which witnesses to call and the evidence to be presented. Finally, that the Trial Chamber by so doing would in effect be descending into the arena of conflict, and thereby fettering the discretion of counsel charged with the defence of the accused.

C. Submissions of the Prosecution

18. Ms. McHenry in her contribution on behalf of the Prosecution submitted that the right of the Trial Chamber to control the Courtroom and to prevent irrelevant, unnecessary or duplicative testimony is undisputed. The Prosecution however denied that different rules were being applied to the Prosecution and the Defence. It was submitted that in very important matters which are contested, some leeway needs to be given to all sides.

D. Applicable Provisions

19. The provisions of the Statute and Rules of the Tribunal set out hereunder and the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR") are applicable and considered in the determination of the motion.

STATUTE**ARTICLE 20**

Commencement and conduct of trial proceedings.

(1) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[. . .]

ARTICLE 21

Rights of the accused.

(1) All persons shall be equal before the International Tribunal.

(2) In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

(3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[. . .]

RULES OF PROCEDURE AND EVIDENCE

Rule 54

General Rule

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 89

General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

[. . .]

Rule 95

Exclusion of Certain Evidence

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96

Evidence in Cases of Sexual Assault

In cases of sexual assault:

[. . .]

(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 98

Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [. . .]

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[. . .]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [. . .]

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[. . .]

E. Findings

20. The Trial Chamber deems it appropriate to recount the circumstances which provoked the Defence counsel in assuming the posture of challenging the principles laid down by the Trial Chamber as enabling in the circumstances, a fair and expeditious trial. It is also helpful to state in a concise and intelligible manner the issues at stake. In a nutshell, it is the exercise of the unrestricted right of the Defence to call witnesses and introduce evidence in their defence.

21. The contention of the accused persons concisely stated is that by a cumulative reading of Articles 20(1) and 21(4)(e) of the Statute of the Tribunal, the accused persons are entitled to call such witnesses as in the judgement of their counsel are deemed appropriate for the presentation of the case for the Defence. Furthermore that the Trial Chamber has no power under the Statute or the Rules to regulate the manner in which the Defence will call its witnesses or to interfere with the testimony that such witnesses will give. The main plank of the principles rests upon the statutory provisions relating to the equality of arms which require that the Defence be entitled to the same conditions for the presentation of its case as the Prosecution (see Art. 21(4)(e) of the Statute).

The Source of the Motion.

22. This motion originates from the effort of the Trial Chamber to control the incidence of duplication of defence witnesses and the repetitive testimony in the evidence of witnesses. At the close of the case for the Prosecution, and before the Defence commenced with the presentation of its case, the Trial Chamber observed from the nature of the defence case and the evidence required to answer the case of the Prosecution, the likelihood of duplication of witnesses and repetition of the same evidence by the various witnesses.

23. There are four accused persons. The charges against the accused persons succinctly stated are founded on the exercise of command authority by the first three accused persons, and specific charges under Articles 2, 3 and 5 of the Statute of the Tribunal. The fourth accused entirely and the

third accused partly are excluded from the principle of command responsibility. All the offences alleged were committed in the same place. It therefore became obvious to the Trial Chamber that the witnesses who would be called to testify are likely to testify about matters relating to, deriving from and acting on command authority. Since the events occurred in the same place and in respect of the same actors, it was inevitable that witnesses would testify about the same events.

24. Accordingly in the status conference convened by the Trial Chamber on Friday, 17 April 1998, counsel to the accused persons were informed of the need to avoid duplication of defence witnesses, and the desirability of streamlining the testimony of defence witnesses in line with the nature of their defence. The Trial Chamber advised counsel to draw up and file with the Registry a list of their witnesses, with a summary of their testimony in relation to the counts in the Indictment. In addition, they were to indicate an estimated duration of their evidence in chief. Counsel were directed to serve counsel to each of the accused persons and the Trial Chamber with these lists.

25. On 21 May 1998, the Trial Chamber convened a status conference. This became necessary because it was observed that counsel on behalf of the Defence had not heeded to the advice to avoid the duplication of witnesses in their lists of witnesses and continued to lead repeated evidence which shed no light on what actually transpired in the Celebici prison or the relationship of the accused with it or its staff. The Trial Chamber impressed upon counsel the need to adhere strictly to the principles of avoiding the duplication of its witnesses, and the repetition of such testimony, otherwise the Trial Chamber would be left with the choice of drawing up its own witness lists for each of the accused persons. The consequence of the decision reached by the Trial Chamber in drawing up an alternative witness list gave rise to the motion filed by the Defence.

Powers of the Trial Chamber- General.

26. There is no doubt that the Trial Chamber is vested with powers as defined in the Statute and the Rules for regulating the proceedings before it. This power involves control of the witnesses before it, and their testimony. If properly construed, it extends to the calling of witnesses. Article 20(1) of the Statute states the general powers vested in the Trial Chambers "to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused...". This provision summarises and includes the protection of the rights of the accused, without spelling them out *in extenso* as in Article 21. A fair trial involves all the protection for the accused as stated in Article 21. It will be fair to describe it as a pithy epitome of what constitutes "a fair administration of justice". In

addition, Rule 54 provides another general rule under which "at the request of either party or *proprio motu*, a Judge or Trial Chamber may issue such orders, summonses etc., as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Although this rule has been applied to orders, summonses, safe conduct, arrest warrants deemed necessary for the purposes of investigation or conduct of the trial, it is also applicable to measures for the control of proceedings necessary for the conduct of the trial.

27. The Trial Chamber's control of proceedings extends to its power to admit any relevant evidence which it deems to have probative value (see Rule 89). A chamber is entitled to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial (see Rule 89(D)). Similarly excluded is evidence obtained by methods which cast substantial doubts on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings (Rule 95). In respect of evidence in cases of sexual assault, the Trial Chamber is empowered to determine admissibility of the consent of the victim, and to satisfy itself that the evidence is relevant and credible (Rule 96(ii)(iv)).

28. There is therefore ample statutory provisions enabling the Trial Chamber to determine whether a particular witness could be called and to control the nature of the testimony.

Rights of the Accused

29. The rights of the accused are clearly spelt out in Article 21 of the Statute. This article prescribes the right of equality of all persons before the Tribunal (Art. 21(1)), the right to a fair and public hearing (Art. 21(2)), and the right to a presumption of innocence until proved guilty according to the provisions of the Statute (Art. 21(3)). It also contains minimum guarantees for the accused (Art. 21(4)). The minimum guarantee directly relevant in this motion is the right of the accused to "examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (Art. 21(4)(e)).

Exercise of the Powers of the Trial Chamber and Control of the Trial.

30. It is well settled law that the exercise of the powers of the Trial Chamber under Article 20(1) is subject to the rights of the accused under Article 21. The rights of the accused so protected occupies a pivotal place in the trial of the accused. Indeed Article 20(1) ensures the observance of the provisions of Article 21 which epitomises the concept of a fair trial. It is important to appreciate

that in addition to the general rights in Article 21(1)-(3), Article 21(4)(e) which is in issue in this motion is one of the five minimum rights guaranteed the accused.

31. The procedural regime designed for the Tribunal and applied by the Trial Chamber consists of a synthesis which is an amalgam of the accusatorial features of the common law and the inquisitorial features of the civil law systems. It is conceded that the former predominates. This procedural philosophy is consistent with the formulation of the Human Rights provisions in the ICCPR and ECHR from which Articles 20 and 21 of the Statute of the Tribunal derive their origin. Accordingly in the interpretation of the provisions of the Articles, regard should be had to their legislative origin and the underlying philosophy.

Interpretation of Article 21(4)(e)

Article 21(4)(e) provides as follows:

(e) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;...

32. This provision which is ambiguous is deceptively simple in its construction. It is important to appreciate that the right of the accused, though guaranteed is subject to the power of the Trial Chamber in Article 20(1) to ensure a fair and expeditious trial. Again, it should be construed within the context of the accusatorial system of procedure, where the accused decides, subject to the control of the court, which witnesses he wishes to call; as well as in the inquisitorial system where the court decides for itself which witnesses it wishes to hear. It is well known that in the accusatorial system, witnesses are examined and cross-examined by the parties or their counsel. The court is also free to put questions to witnesses. In the inquisitorial system, only the court examines witnesses.

33. The intention of Article 21(4)(e) is to ensure that the accused is placed in a position of complete equality with respect to the calling and examination of witnesses with the Prosecution. The Trial Chamber may in appropriate cases refuse to hear evidence which is irrelevant and witnesses whose evidence is repetitious (see Rule 89(C)). It cannot be disputed that repetitious evidence is not only irrelevant to the issue to be established, it also impedes the expeditious trial that the Trial Chamber is enjoined to ensure. The underlying principles governing the exercise of the right to control witnesses is that the evidence sought to be adduced must be relevant, and the testimony must not be repetitive. It is also obvious that even where evidence is relevant, but has no

probative value, the Trial Chamber will be free to exclude it (see Rule 89(D)). The defendants have in this motion relying on Art. 21(4)(e) argued that the Trial Chamber has no power to exclude evidence because the right to examine or have examined witnesses and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him vested in the accused, cannot be interfered with. This submission has not taken cognisance of the powers vested in the Trial Chamber by Statute. We have stated that Article 21(4)(e) is in *pari materia* with Article 14(3) of the ICCPR and Article 6(3)(d) of the ECHR.

34. In *X v FRG*, Application No. 3566/68, the European Commission of Human Rights, (“Commission”) construing Art. 6(3)(d) of the ECHR in *pari materia* with Article 21(4)(e) held that there was no general right to call witnesses. In particular, a court is justified in refusing to summon witnesses whose statements would not be of any relevance in the case. (See Application No. 617/59 *Hopfinger v Austria*, Yearbook III, p. 370).

35. Similarly in *X v Austria*, Application No. 4428/70, in interpreting the provisions of Article 6(3)(d) of ECHR, the Commission said that the provision aimed at ensuring equality between the defence and the Public Prosecutor in criminal proceedings with regard to the calling and interrogation of witnesses, but that it does not give an accused person an unlimited right to obtain the attendance of witnesses in court. The Commission went on to point out that the competent court was free, subject to respect for the terms of the Convention and particularly for the principle of equality established by Art. 6 (3)(d) to refuse calling witnesses nominated by the defence, for instance, on the ground that the court considered their evidence as being unlikely to assist in ascertaining the truth. (See for example, opinion of the Commission in its report of 31 March, 1963 on Application No. 788/60, *Austria V Italy*, paras. 112, 115).

36. In the particular circumstances of this motion, the Defence is challenging the statement of principle formulated by the Trial Chamber outlining the basis on which witnesses would be called to give evidence, and testimony of witnesses will be admitted. The principles are that witnesses called should not merely duplicate the evidence of earlier witnesses, and the testimony of witnesses should not be repetitive of testimony already admitted. The Trial Chamber is of the opinion that the principle applied is consistent with Article 20(1) and does not in any way violate any of the provisions of Article 21.

37. By virtue of Article 20, the Prosecution can be directed to file a list of witnesses intended to be called, with a summary of the facts on which each witness will testify relevant to the counts in the Indictment. The Prosecution is required to indicate the estimated duration of the testimony of each witness.

38. The Defence has contended that by drawing up a list of the witnesses for the Defence, the Trial Chamber will be descending into the arena of conflict. Of course it is unarguable that the Trial Chamber is ill equipped to draw up a list of witnesses for the Defence and would be usurping the discretion of the Defence if it had to play that role. The Trial Chamber would in such a case be violating the right of the Defence to communicate with counsel of his own choosing in the preparation of his defence. The Trial Chamber has not in the instant case violated Article 21(4)(b). The principles formulated are intended to guide Defence counsel in determining the witnesses they should call and the evidence they are required to give. It is also intended to enable the Trial Chamber discharge the responsibility of an expeditious trial in Article 20(1) which corresponds with the accused's right in Article 21(4)(e) to be tried without undue delay. Counsel is free to call its witnesses bearing in mind the guidelines.

39. The Defence contends that the principles enunciated by the Trial Chamber are in violation of the principle of the equality of arms between the Prosecution and the Defence. They argue that the Prosecution was not subjected to the same scrutiny and control in the presentation of their evidence and calling of their witnesses. The Defence should therefore be treated similarly.

40. Admissibility of evidence is founded on relevance. Relevance is based on the nature of the issue before the Trial Chamber. A sharp distinction is usually drawn between relevance and admissibility. The determination of relevance is based on the nexus between the testimony and the issue subject matter of the testimony. A matter is relevant if taken by itself or in connection with other facts, it proves or renders probable the existence or non-existence of the issue. Otherwise, it is irrelevant to the issue before the Trial Chamber.

41. The Defence has not by the application of the guidelines been placed at any disadvantage vis-à-vis the defence of the accused person. The right to examine and cross-examine witnesses on the same terms and conditions as the Prosecution witnesses has not been denied. The Defence is entitled and have exercised their right under Article 21(4)(e). This is consistent with the principle that their right to call witnesses is not unlimited. Similarly their right to give testimony is also not

without restrictions imposed by law and the exercise of judicial discretion allowed the Trial Chamber. It is erroneous to accuse the Trial Chamber of a violation of the right of the Defence.

42. The fact that Article 20(1) vests in the Trial Chamber the power to protect the right of the accused is usually ignored. It ought to be stressed that where the error of Counsel in the calling of witnesses and leading evidence at the trial will lead to unreasonable and undue delay in the trial, and may be prejudicial to the case of the accused. The Trial Chamber should exercise its power *proprio motu* to avert any injustice that will result if it did not intervene.

43. Adherence by the Defence to the principles in the guidelines formulated by the Trial Chamber in calling of witnesses and leading of evidence at trial will in no way deprive the accused of assistance of Counsel to discharge a different burden. Each accused is expected to discharge his or her burden of proof in presenting evidence. Application of the principles in the guidelines will effectively streamline the evidence of the witnesses by avoiding the duplication of witnesses and repetitive testimony at the trial. It does not in any way deprive the Defence of the right to challenge evidence previously presented by the Prosecution and found to be relevant. The witnesses are to be determined by the accused. Only witnesses who are duplicated and whose evidence is likely to be repetitive is sought to be excluded. There is no question of the Trial Chamber determining credibility without a hearing. Clearly, that issue does not arise. The Trial Chamber has scrupulously observed the mandatory provisions of Articles 20(1) and 21.

The issue of Fair Hearing

44. The Trial Chamber is aware of the importance of a fair trial which is a central principle and cardinal rule of the rule of law. The cumulative provisions of Articles 20(1) and 21 of the Statute of the Tribunal and the Rules of Procedure and Evidence are formulated and designed to ensure a fair trial within the rule of law. It is obvious that compliance with the specific rights set out in Article 21 alone may not necessarily guarantee that there has been a fair trial. The content of the requirement of a fair hearing cannot be stated *in abstracto*. A fair trial can only be considered within the plenitude of the trial as a whole.

45. In *Mohammed v Kano N.A.* (1968) 1 All NLR 115, the Supreme Court of Nigeria observed of a fair hearing as follows:

A fair hearing must involve a fair trial; and a fair trial of a case consists of the whole hearing. The test of a fair hearing is the impression of a reasonable man present at the

trial, whether from his observation justice has been done in the case. The burden is on the party complaining to show that the irregularity complained of led to a failure of justice.

This observation applies *mutatis mutandis* to a fair trial.

46. By prescribing guidelines to assist the Defence to call its witnesses and avoid duplication of witnesses and repetitive testimony, the Trial Chamber is not descending into the arena of conflict. These are guidelines which the parties can usefully apply to save cost in time and expense. It is not a valid criticism that the guidelines were introduced only when the Defence was giving evidence and not during the presentation of evidence of the Prosecution. There is no doubt that the principles formulated do not in any way fetter the exercise of discretion of counsel in management and organisation of the case of the defence, since counsel is still entirely in charge of the defence of the accused.

47. In *Kraska v. Switzerland* (1994) 18 EHRR 188, para. 30 of the judgment, the Court interpreting Article 6(1) said; *inter alia*

The effect of Article 6(1) is, *inter alia*, to place the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to the decision.

48. The Trial Chamber accepts and adopts this view as correctly expressing the role of the Trial Chamber pursuant to Art. 20(1) of the Statute. A fair trial can only be determined from a consideration of the case as a whole whether the trial in accordance with laws regulating the trial has been fair. The Defence has fastened on the erroneous view of their construction of Article 21(4)(e), that the Defence has an unlimited right to call witnesses, and unrestricted right to lead evidence irrespective of their relevance to the issues before the Trial Chamber. Nothing is further than the true legal position. The Trial Chamber has observed all the rules enabling the accused persons to enjoy their right to a fair trial.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER,**

HEREBY DISMISSES the Motion.

Done in both English and French, the English version being authoritative.



Adolphus G. Karibi-Whyte
Presiding Judge

Dated this twelfth day of June 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]